

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION**

The Smitten Kitten, Inc.	:	Case No. 1:10-cv-00663
Plaintiff,	:	
	:	Judge Barrett
v.	:	
	:	
Mike Fernandez, d/b/a Sex Toys	:	
Revolutions	:	
Defendant.	:	

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**PLAINTIFF’S MOTION FOR SERVICE BY PUBLICATION**

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Pursuant to Fed. R. Civ. P. 4(e)(1) and Ohio R. Civ. P. 4.4(A), now comes Plaintiff The Smitten Kitten, Inc. (“TSK”), by and through counsel, and hereby moves this Court for service by publication of the Complaint and Summons in this matter. The reasons for this Motion are outlined in the attached Memorandum in Support.

Respectfully submitted,

s/ Amy Ruth Ita

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**MEMORANDUM IN SUPPORT OF MOTION**

**I. INTRODUCTION AND BACKGROUND.**

TSK filed this action on September 24, 2010, alleging trademark infringement under 15 U.S.C. §1114 and false designation of origin, a false or misleading description of fact, a false representation, and/or unfair competition in violation of 15 U.S.C. §1125(a). The clerk of courts issued the Summons on September 27, 2010. Per Fed. R. Civ. P. 4(m), the deadline to serve the Summons and Complaint on Defendant is January 22, 2011. Despite TSK's efforts to serve Defendant personally, TSK has been unable to locate Defendant for service. Accordingly, TSK respectfully requests that this Court order service by publication.

**II. SERVICE BY PUBLICATION IS WARRANTED IN THIS MATTER.**

**A. Legal Standard.**

Federal Rule of Civil Procedure 4 provides the following with respect to serving an individual defendant:

**(e) Serving an Individual Within a Judicial District of the United States.**

Unless federal law provides otherwise, an individual — other than a minor, an incompetent person, or a person whose waiver has been filed — may be served in a judicial district of the United States by:

(1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or

(2) doing any of the following:

(A) delivering a copy of the summons and of the complaint to the individual personally;

(B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or

(C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

Ohio Rule of Civil Procedure 4.4 provides:

**RULE 4.4 Process: Service by Publication**

**(A) Residence unknown.**

(1) Except in an action governed by division (A)(2) of this rule, if the residence of a defendant is unknown, service shall be made by publication in actions where such service is authorized by law. Before service by publication can be made, an affidavit of a party or his counsel shall be filed with the court. The affidavit shall aver that service of summons cannot be made because the residence of the defendant is unknown to the affiant, all of the efforts made on behalf of the party to ascertain the residence of the defendant, and that the residence of the defendant cannot be ascertained with reasonable diligence.

Upon the filing of the affidavit, the clerk shall cause service of notice to be made by publication in a newspaper of general circulation in the county in which the complaint is filed. If no newspaper is published in that county, then publication shall be in a newspaper published in an adjoining county. The publication shall contain the name and address of the court, the case number, the name of the first party on each side, and the name and last known address, if any, of the person or persons whose residence is unknown. The publication also shall contain a summary statement of the object of the complaint and demand for relief, and shall notify the person to be served that he or she is required to answer within twenty-eight days after the publication. The publication shall be published at least once a week for six successive weeks unless publication for a lesser number of weeks is specifically provided by law. Service shall be complete at the date of the last publication.

After the last publication, the publisher or its agent shall file with the court an affidavit showing the fact of publication together with a copy of the notice of publication. The affidavit and copy of the notice shall constitute proof of service.

**B. TSK Has Exhausted Efforts To Personally Serve Defendant Such That Service By Publication Is Necessary.**

Since filing the Complaint on September 24, 2010, TSK made many efforts to attempt to serve Defendant personally. Counsel for TSK retained a personal process server on September 27, 2010. The process server made attempts on September 28 and October 1, 4, and 7, 2010 to serve Defendant at his last known address, 5622 Ridge Road, Cincinnati, OH 45213. On October 11, 2010, the process server reported to counsel for TSK that he was unable to locate Defendant. In fact, a person purporting to own the residence, as registered on the county auditor website, reported to the process server that Defendant had moved. (Ita Aff. ¶¶ 3–5 & Ex. A; Pokopac Aff. ¶¶ 3–9). Counsel for TSK has conducted additional research to ascertain a business address for Defendant or an alternative residence and has been unable to do so. (Ita Aff. ¶¶ 6–7 & Ex. B). TSK therefore has no alternative to serve Defendant other than service by publication.

Incidentally, Defendant does indeed appear to be aware of the case. He is quoted in an article published online by XBIZ News Report on September 29, 2010 concerning the lawsuit filed against him. (Ita Aff. ¶ 8 & Ex. C).

**CONCLUSION**

For the foregoing reasons, TSK respectfully requests service by publication; a proposed Order will be submitted to chambers.

Respectfully submitted,

s/ Amy Ruth Ita

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